Trump Docs Investigation Has Lessons For White Collar Attys

By **Kenneth Notter** (March 7, 2023)

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Lawyers representing former President Donald Trump have repeatedly found themselves in hot water.

Most recently, Trump's lawyers have become witnesses in special counsel Jack Smith's investigation of Trump's handling of sensitive government documents after leaving office. In fact, over the past few months, at least three of the lawyers have testified before the grand jury.[1]

For one of those lawyers, the situation has escalated. During his grand jury testimony, M. Evan Corcoran reportedly asserted attorney-client privilege in refusing to answer questions relating to his representation of Trump.[2]

The special counsel is now seeking to compel Corcoran to answer those questions under the crime-fraud exception[3] for communications "made in furtherance of a future crime or fraud," as the U.S. Supreme Court articulated in its 1989 U.S. v. Zolin decision.[4]

Testifying to a grand jury about communications with a client creates a difficult situation for any lawyer.

But no matter how this episode ends, it is a valuable reminder for white collar lawyers that there are best practices to mitigate the risks — for both client and counsel — associated with criminal investigations.

The Risks to Client and Lawyer

The chief risk to clients in criminal investigations is obvious — indictment and conviction. That is true even for clients who are not targets of the investigation, given the danger of drawing a charge for obstruction, perjury or making a false statement.

Apart from criminal liability, investigations can ruin a client's public reputation and inflict a heavy emotional and financial toll.

Representing clients in criminal investigations carries its own risks. A lawyer accused of withholding documents, or advising others to withhold documents, from investigators may face charges for obstruction of justice.[5]

And perjury charges may follow where a lawyer is accused of lying to investigators.

More often, however, lawyers face ethical quandaries. Receiving a subpoena, for instance, generates a potential conflict of interest because the lawyer's personal interest as a witness may impair the representation.[6]

The lawyer must therefore decide whether the potential conflict risks impairing the representation, whether to seek the client's informed consent and whether informed consent will cure the conflict.

The crime-fraud exception puts a lawyer in an even more untenable situation. Ethics rules

typically allow — but do not require — lawyers to reveal client confidences to comply with a court order.[7] Yet deciding whether to comply with an order to testify under the crime-fraud exception is fraught with dilemmas.

Testifying risks providing answers beyond the scope of the court order and thus violating the lawyer's duty of confidentiality.[8] Not testifying risks contempt. And both choices risk damaging the lawyer's reputation.

Best Practices for Navigating Investigations

Though nothing can eliminate these risks, there are ways to decrease the odds of arriving at the precarious situation that Trump and his lawyers reportedly find themselves in.

Remind clients of obstruction risk.

Every client needs to understand the risk the obstruction statutes pose. Those statutes are broad and vaguely worded, and they carry serious penalties.[9] As a result, prosecutors can leverage the obstruction statutes to target conduct that many nonlawyers might not deem criminal.[10]

Even the mere perception of obstruction can trigger a separate investigation or heightened scrutiny in the primary investigation.

It may also squander any chance of negotiating a noncriminal resolution to the investigation or securing favorable terms for complying with investigative requests.

And perceived obstructive conduct may invite a subpoena, and accompanying ethical dilemmas, to the lawyer personally.

For that reason, counsel should clearly and repeatedly remind the client — preferably in writing — to avoid any conduct that, even if innocent, could be seen as interfering with the investigation. That includes:

- Destroying, concealing or altering documents or other communications, including text messages, emails, social media posts and app-based communications;

- Discussing the investigation publicly or with other potential witnesses or subjects;

- Taking any adverse or retaliatory actions — e.g., firing — against persons involved in the investigation;

- Making any misleading statements about the investigation, publicly or privately, that could reach investigators; and

- Creating or sending documents that are misleading, false or otherwise not genuine.

For corporate clients, counsel should also promptly circulate a formal litigation hold memorandum explaining the corporation's and employees' obligations to preserve documents and other information.[11]

Similarly, all clients should be reminded to suspend any automated process that may destroy data, documents or communications — including chat messages. Even in civil litigation, not doing so may invite a motion for sanctions, as several litigants have recently discovered.

These reminders both protect the client from possible criminal liability and help prevent the lawyer from becoming a witness against the client.

Set clear expectations with clients and investigators.

Government investigations are stressful — even for clients who face no imminent criminal liability. And for many clients, this will be their first experience with the criminal justice system.

Simply walking clients through the stages of a typical investigation and broadly explaining what to expect in the near and long term can reduce anxiety and bring some comfort in a distressing situation.

But it is important not to sugarcoat it. Clients must be prepared for what could potentially be years of government scrutiny led by zealous — or perhaps overzealous — investigators, questioning of friends and family, and unflattering news coverage.

Explaining these challenges — and charting a plan to confront them — will manage unrealistic client expectations, demonstrate that you are there to protect their interests, and reduce the understandable desire for immediate but rash action that can bring liability for the client and possibly the lawyer.

It is equally important to set clear expectations with investigators. When responding to a subpoena, for example, clarify your understanding of the subpoena's scope; document any agreement with investigators narrowing the scope; and reiterate, preferably in writing, what investigators should expect.

Ask for an extension if necessary, but set a realistic target, and be clear about the deliverables. Then deliver as promised.

Setting and meeting expectations reduces the chances that investigators will misinterpret a lawyer's conduct as interfering with the investigation. And preventing that misimpression protects the lawyer — and the client — from accusations of obstruction or ethical violations.

Document the process.

Defending clients in investigations involves significant logistics: identifying potential sources of information, retaining vendors to collect documents or image devices, and interviewing custodians or potential witnesses.

In the process, it is easy to lose track of what has and has not been done in an

investigation.

That can result in a lawyer providing investigators with incomplete or inaccurate responses. At a minimum, an incomplete or inaccurate response will cost the client the expense and headache of another round of responses.

It may also raise questions about the lawyer's compliance with ethical obligations to avoid improperly impeding an opponent's access to evidence.[12] Or it may supply the basis for investigators to seek approval for a subpoena to counsel or a court order compelling counsel to testify under the crime-fraud exception.[13]

One solution is to draft a memorandum to the file documenting the steps taken in gathering, reviewing and producing materials to investigators.

If the client is involved in the process, have the client review the memorandum to ensure all statements are accurate.

That memorandum will later serve as (1) a resource when representing to investigators what steps were taken, (2) an internal check to ensure no steps were skipped, and (3) an added layer of documentation showing the client's and counsel's good faith.

Protect your credibility at all costs.

Credibility — with investigators and the client — is a lawyer's most precious resource.

Losing credibility with investigators may lead to more aggressive investigative measures like executing search warrants or issuing subpoenas to counsel. And clients who don't trust their lawyer are more likely to conceal information, which can end with the lawyer relaying inaccurate information to investigators. Both scenarios are legally perilous.

The following best practices can help protect a lawyer's credibility.

Annotate communications.

Nothing saps credibility faster than signing an inaccurate or misleading document — even an email. When drafting communications, consider including annotations with the basis for every assertion, and then removing the annotations before sending the final copy.

Doing so preserves a record of the basis for each assertion and forces the drafter to reflect before inadvertently making a statement without support.

Be precise.

Categorical language is responsible for many inaccurate or misleading statements — particularly in criminal investigations where uncertainty is unavoidable.

Whenever possible, replace such categorical language with specific assertions. For example, rather than saying "any and all responsive documents have been produced," say "responsive documents identified during the review have been produced."

Sticking to narrow assertions helps mitigate the risk that future developments will prove earlier statements untrue.

Be confident, not inflammatory.

Advocate for the client, document government misconduct, and call out errors or weaknesses in investigators' theories as needed. Those actions protect the client and discourage government overreach.

Name-calling, inflammatory rhetoric and unfounded accusations of bad faith do neither.

Nor do those tactics prepare the client for the possibility that a court or jury may disagree with your polarized view. Rather, they escalate tensions and increase the potential for drastic action that lands both client and lawyer in hot water.

Conclusion

Navigating criminal investigations is never easy. A winning defense strategy in one investigation may end in disaster in another. And there is no way to guarantee a successful outcome.

But as the Trump documents investigation illustrates, following certain best practices can increase the chances of success — for both client and lawyer.

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[1] Hugo Lowell, Three Trump Lawyers Have Appeared Before Grand Jury in Documents Inquiry, The Guardian (Feb. 14, 2023), https://tinyurl.com/4hhksa9f.

[2] Maggie Haberman & Ben Protess, Trump Lawyer in Mar-a-Lago Search Appeared Before Grand Jury, The New York Times (Feb. 10, 2023), https://tinyurl.com/mr49feh4.

[3] Alan Feuer et al., Prosecutors Seek Trump Lawyer's Testimony, Suggesting Evidence of Crime, The New York Times (Feb. 14, 2023), https://tinyurl.com/3ajmcfpd.

[4] United States v. Zolin, 491U.S. 554, 563 (1989).

[5] See United States v. Beckner,134 F.3d 714, 717 (5th Cir. 1998) (lawyer charged with but acquitted of obstruction for withholding documents from a grand jury).

[6] ABA Model Rules of Prof'l Conduct 1.7(a)(2).

[7] ABA Model Rules of Prof'l Conduct 1.6(b)(6).

[8] See ABA Model Rules of Prof'l Conduct 1.6(c) (lawyers must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client").

[9] See, e.g., 18 U.S.C. §§1503, 1505, 1512, 1519. For further discussion of the

obstruction statutes and associated risks, see Steven F. Molo et al., Corporate Internal Investigations §9-09 (rev. 2022).

[10] See, e.g., United States v. Gray, 692 F.3d 514, 519 (6th Cir. 2012) (affirming conviction under §1519 for correctional officer's omitting information in an incident report).

[11] For further discussion of drafting litigation hold notices, see Steven F. Molo et al., Corporate Internal Investigations §8-04[4][a] (rev. 2022), and Abramowitz et al., Defending Corporations and Individuals in Government Investigations §18:12 (rev. 2022).

[12] ABA Model Rules of Prof'l Conduct 3.4(a).

[13] U.S. Dep't of Just., Justice Manual §9-11.255 (2016).